IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Brief April 29, 2009

STATE OF TENNESSEE v. DOUGLAS KEITH BEAR

Appeal from the Criminal Court for Sullivan County
No. S50643 Robert H. Montgomery, Jr., Judge

No. E2008-01498-CCA-R3-CD - Filed February 5, 2010

The Defendant, Douglas Keith Bear, appeals his convictions in the Criminal Court for Sullivan County for four counts of rape of a child, a Class A felony, and four counts of incest, a Class C felony. The trial court sentenced him to twenty-five years for each count of rape of a child and to six years for each count of incest. Three of the rape sentences were to be served consecutively, for an effective sentence of seventy-five years. On appeal, the Defendant contends (1) that the evidence is insufficient to sustain his convictions, (2) that the trial court erred in refusing to allow the defense to offer evidence of the victim's prior sexual behavior, (3) that the trial court erred when it determined that a child witness was available for the defense despite the witness's adoption by a foster parent, (4) that the trial court erred in allowing the State to attack the testimony of the Defendant's witnesses during the State's closing argument, and (5) that the trial court erred in sentencing him to seventy-five years as a Range I offender. We affirm the convictions, but we conclude that the trial court erred in applying two enhancement factors to the Defendant's sentences. Although consecutive sentences are appropriate, we modify the Defendant's sentences for rape of a child to twenty-three years each and the Defendant's sentences for incest to five years each, for an effective sixty-nine year sentence.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part; Sentences Modified

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Jerry J. Fabus, Jr., Gray, Tennessee, for the appellant, Douglas Keith Bear.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Amber Massengill and Julie Canter, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

This case arises from the rape of a child, C.B., by her father, the Defendant. Dr. Lowell Biller of the Kingsport City Schools testified that he was the supervisor of student attendance. He said his duties included overseeing the school district's attendance program and maintaining accurate attendance records. He said that C.B. enrolled as a student at Roosevelt Elementary School in the Kingsport City School system on August 19, 2002, and that she withdrew as a student on August 9, 2004.

Pier Weston testified that she was the community manager for Model City Apartments in Kingsport and that she was the official custodian of tenant records. She said that lease applications, leases, maintenance records, rent adjustments, correspondence, and inspection letters were kept as part of a permanent record in a resident file. She said the Defendant moved into Model City Apartments on May 10, 2002, and moved out on October 9, 2003.

Debbie Kennedy testified that she was the Defendant's former mother-in-law and that the Defendant had been married to her daughter, Eva Flannery. She said that during their marriage, the Defendant and her daughter had two children, B.B. and C.B.

C.B., who was eleven years old at the time of trial, testified that she had been adopted, and she would not state her new last name. She said that she was born on March 28, 1996, and that the Defendant was her biological father. She said that she had lived at Model City Apartments with the Defendant and her sister, B.B., and that she had attended Roosevelt Elementary school.

C.B. testified that a good touch was a pat on the back. She said that a bad touch meant "you're not supposed to touch right there." She called her vagina her "private part" and her anus her "bottom." She said there was a bad touch by the Defendant after she had started attending school. She said that she and her sister were sleeping in the Defendant's bed and that they were wearing their pajamas. She said the Defendant slept between them. She said that the Defendant tried to put his penis into her vagina and that it went in "a little." She said that when the Defendant's penis would not go into her vagina, he put it into her anus. She said that it hurt, that she screamed, and that the Defendant covered her mouth with a cloth or a sock. She said the Defendant told her afterwards that he would go to jail.

C.B. testified that another bad touch happened before the Woods family moved into their apartment. She said that she and her sister, B.B., were playing in the room they shared, when the Defendant came in and told B.B. to get out. She said she thought that the Defendant locked the door. She said that the Defendant told her to get onto the bed and that she lay on the bed on her back. She said that the Defendant tried to put his penis in her vagina and that when it would not fit, he put his penis in her anus. She said that it hurt, that she screamed, and that he covered her mouth with a cloth. She said the Defendant told her he would go to jail, but he did not say why.

C.B. testified that the Woods family–a mother, a father, and a little boy–moved in with them. She said that she, her sister, and the Woods family were watching television in the living room. She said that the Defendant told her to clean up his room and that she went into the Defendant's room. She said that she heard the door shut and that when she turned around, it was the Defendant. She said that the Defendant told her to lie on his bed and that he tried to put his penis into her vagina. She said that when the Defendant's penis would not go into her vagina, he put it in her "bottom." She said that the Defendant's penis went inside, that it hurt, and that she screamed. She said the Defendant told her he would go to jail. She said there was another bad touch when the Defendant put his penis in her mouth. She said the Defendant's "pee went in [her] mouth," and she spit it out.

C.B. testified that she knew Joanna Hooven. She said that Hooven was like a mother to her and that Hooven was the first adult she told of the abuse. She said she told Hooven that something bad was happening at the Defendant's house. She said she never went back to the Defendant's house after that. She said she went into foster care.

On cross-examination, C.B. testified that she could remember the events about which she testified. She said she talked about the abuse on the day before trial, and before that she last talked about the abuse when she was seven or eight years old. She said that before she talked about the abuse on the day before trial, she remembered "just a couple" of the incidents "a little well." She said she remembered Joanne Hooven. She said Joanne Hooven had been married to someone else while Hooven and the Defendant were dating. She said she did not know if the Defendant and Hooven had ended their relationship before she went into foster care. She said she had not seen Hooven often shortly before she was taken from the Defendant's custody.

C.B. testified that she stayed perhaps two nights with Hooven, but she could not remember their conversation. She agreed that she had testified that the first person she told about the abuse was Hooven. She said she did not remember going to the doctor and could not remember telling the doctor that the Defendant had never put anything in her. She said that she would have remembered the abuse even if she had not talked to the prosecuting attorney the day before the trial. She did not remember her Aunt Cathy nor did she

remember staying with her Aunt Cathy, but she remembered Aunt Cathy's daughter, Tiffany. She remembered Patricia Bear, her Aunt Trish, "a little." She could not remember the last time she had seen her biological family before the day of the trial. She said she did not remember talking to the Department of Children's Services (DCS), law enforcement, Hooven, or her mother right after she was removed from the Defendant's home.

Dr. Katherine Scruggs of Holston Medical Group was accepted as an expert in obstetrics and gynecology. She testified that she conducted physical examinations of children for evidence of sexual abuse on behalf of the Children's Advocacy Center. She said she examined C.B. on July 2, 2004, when C.B. was eight years old, because of allegations of sexual abuse. She said that when she questioned C.B. about sexual abuse, C.B. stated it had occurred. She said that C.B. named her father as the perpetrator and that C.B. referred to the Defendant as "Doug." She said C.B. stated that the Defendant had touched her in her genital area with "his private" and tried to put it inside her but that it would not fit. She said C.B. recalled that it caused pain but not that it caused any bleeding. She said C.B. stated that the Defendant put lotion on his genitals and that he touched her in her anal area. She said that she asked C.B. if anyone other than the Defendant had ever attempted to touch her inappropriately and that C.B. responded that no one had.

Dr. Scruggs testified that the physical exam of C.B. included an exam of C.B.'s head, chest, heart, lungs, skin, and abdomen. She said that she conducted a general pelvic exam and that C.B. appeared normal. She agreed that almost one month had passed from the report of the abuse on June 11, 2004, to the physical exam on July 2, 2004. She said that within a reasonable degree of medical certainty, she believed it was uncommon to see evidence of abuse after that amount of time. She said that most anal trauma completely healed within two weeks and that she was unlikely to find any signs of abuse after that time.

On cross-examination, Dr. Scruggs agreed that her report stated C.B. said the Defendant had not inserted anything into her anus. She agreed that the examination results indicated C.B. was normal and that C.B.'s hymen appeared normal. She said that ninety-five percent of children who are sexually abused have a normal examination two weeks past the event. She said this held true even if the child were only seven years old.

Detective Melanie Adkins of the Kinsgport Police Department testified that she worked for fourteen years primarily as a child abuse investigator. She said she had specialized training in child abuse cases. She said she worked as a child sexual abuse investigator in 2004 and became involved in the Defendant's case on June 17, 2004, on a referral from DCS.

Det. Adkins testified that the Defendant came to the Justice Center for an interview on June 21, 2004, and that she took a statement from him. She said that no one else was

present during the interview. She said the Defendant was dressed neatly and appeared normal. She said the Defendant did not appear intoxicated and his speech was coherent. She said that as far as she knew, the Defendant drove himself to the Justice Center. She said she took the Defendant's statement in an interview room in the criminal investigation unit. She said she followed the standard procedure she employed every time she interviewed a suspect and took a statement. She said that the Defendant did not request an attorney and that he gave his statement freely and voluntarily. She said she made no promises in exchange for the Defendant's statement and did not use coercion or threats. She said the Defendant was not placed in custody and was free to leave. She said the Defendant did not refuse to answer any questions. She said the Defendant signed the statement after reviewing it and making corrections. She read the Defendant's June 21, 2004, statement to the jury.

The Defendant's statement described his divorce from C.B.'s mother, his relationship with Hooven, and his relationship with the Woods family. In the statement, the Defendant said he divorced his wife because of her adultery, that his and Hooven's relationship ended after she accused him of being gay, and that about two months after, his daughters spent two nights with Hooven. He said that DCS called him on the second night of his daughters' stay with Hooven. He stated that he had never done anything to C.B. He said that he was friends with the Woods family and that they stayed with him for about a week while they looked for a place to live.

Det. Adkins testified that she spoke to the Defendant again on June 25, 2004. She said that she went to the Defendant's home on July 9, 2004, and that the Defendant volunteered to let her inspect his trailer. She said the purpose of this visit was to obtain more evidence to support or to negate the allegations. She took a quilt and a bedspread from the Defendant's trailer and sent them to the Tennessee Bureau of Investigation (TBI) Crime Lab. She said that it appeared the quilt and bedspread had been washed, although they showed old stains.

Det. Adkins said she interviewed the Defendant a second time on July 30, 2004, at the Justice Center. She said the Defendant returned her call after she left a message with his mother. She said that as far as she knew, the Defendant drove himself to the second interview. She said that no one else was present during the second interview. She said that the Defendant was not in custody, that he was free to leave, and that he left after the interview. She said she followed standard procedure for interviewing and obtaining a statement from a suspect. She said that shortly after the interview began, the Defendant started to hyperventilate. She said he ran out of the interview room and criminal investigation unit and into the hallway. She said she offered to obtain medical treatment for him, to call an ambulance, and to call 9-1-1. She said the Defendant stated he would be fine and just needed to catch his breath. She said the Defendant's breathing returned to normal. She said that she offered medical assistance again, perhaps two or three times, but that the

Defendant refused. She said the Defendant initiated the conversation by stating, "I just can't believe that my girls would say this about me." She said she did not force the Defendant to begin talking again. She said the Defendant continued his statement freely and voluntarily and not as a result of threats or promises. She read the Defendant's July, 30, 2004, statement to the jury:

> I never did anything while I lived at Model City Apartments. It might have happened while we lived on Cloudsford Road. It happened in the room but I did not lock the doors. It was maybe once or twice I put my penis in [C.B.]'s mouth. I think I ejaculated maybe once. I don't remember if my clothes were on or off or if I just unzipped my pants. It was another personality that made me do this. I may have been drinking when I did this. I used lotion. I put it on my penis and tried to put it in butt-hole. I never tried to put in the front hole. I have homosexual tendencies but I don't practice it. Maybe my mind was going back to that and maybe that's why I tried to put my penis in [C.B.]'s butt-hole. My penis didn't go into her butt-hole. I had an erection but it just wouldn't go in. It just went up between her legs. This only happened about once. I never did oral sex. [C.B.] used to climb all over me. I don't remember feeling aroused when [she] did this. I used to watch porn and maybe this is what made me aroused when I did this. I don't remember the dates that I did this. It all happened when we were living on Cloudsford Road. I've lived there for about a year. I did not put my penis inside. I tried to put it in the butt-hole but it wouldn't go. It went inside the legs. I ejaculated when I did this but I don't remember if it was every time. I think I need counseling for this because I couldn't have been in my right mind.

Det. Adkins testified that the Defendant and C.B. resided at Model City Apartments between August 2002 and June 2004 and that they moved to Cloudsford Road. She said she went to the Cloudsford Road residence a second time on August 20, 2004, to search for additional evidence. She said she had a search warrant. She said that the Defendant gave his consent to search and signed a consent form. She said she recovered girl's panties from the glove box of his vehicle. She secured the panties, and they were sent to the TBI Crime Lab. She said she recovered videotapes containing adult pornography. She said that she obtained a blood sample from the Defendant on February 11, 2004, and a buccal swab from C.B. on February 14, 2005, and that they were sent to the TBI Crime Lab.

On cross-examination, Det. Adkins testified she spoke to C.B. very briefly on June 21, 2004, and conducted the major interview with C.B. on June 22, 2004. She said Hooven reported the abuse to DCS. She said the June 21, 2004, interview with the Defendant lasted between one and one-half and two hours. She said she told the Defendant the interview concerned allegations of sexual abuse involving his daughter. She confirmed the Defendant began hyperventilating about thirty minutes into the second interview, while they were still reviewing the statement the Defendant had made during his first interview. She said she was never able to corroborate the Defendant's affair with Hooven. She could not recall whether she told C.B.'s mother, Eva Flannery, that she believed the allegations of sexual abuse or whether the Defendant was having an affair with Hooven, but she agreed that her notes would provide an accurate account of that conversation. She said she found the girl's panties on August 20, 2004, approximately two months after C.B. had been removed from the Defendant's home.

Det. Adkins testified that she handwrote the Defendant's second statement and that it was not video- or audio-taped. She said it was department policy not to tape suspects' statements. She said that no department policy existed as to how many people should be present when taking a statement and that it just happened that she was alone with the Defendant when he made his statement. She said she routinely wrote out the suspects' statements because many could not write, read, or spell correctly. She said she read the statement to the suspect after an instruction that the suspect should stop her if anything was incorrect. She said she gave the suspect a copy of the statement in order that he or she could follow along as she read aloud. She said that after she finished reading the statement, she asked the suspect if he or she wanted to change, add, or remove anything. She confirmed that the Defendant gave his second statement after the incident when officers had asked the Defendant if he needed medical treatment. She acknowledged that the Defendant voluntarily came to the Justice Center for both interviews, that he was very cooperative, and that he consented to Det. Adkins's search of his residence. She said that as far as she knew, the Defendant drove himself to the second interview but that she would not contradict the Defendant if he stated that his father drove him. She did not remember if she saw the Defendant's father at the Justice Center, and she said that she would not recognize the Defendant's father. On redirect examination, Det. Adkins described the girl's underwear retrieved from the Defendant's car as a girl's small, white panties, with little flowers on them.

Special Agent Charles Hardy of the TBI Nashville Crime Laboratory testified that he had worked as a forensic scientist for eight years. He was accepted as an expert in serology and DNA analysis. He explained the processes for analyzing for the presence of blood and semen, and he explained that he needed "standards" from a victim or a suspect before he could proceed to DNA analysis. He identified an evidence envelope containing Fruit of the Loom girl's underwear, size six, white with blue flowers and purple butterflies. He said that

the item described in his TBI Crime Laboratory report matched the item inside the evidence envelope and that the panties appeared to be in the same condition as when he returned them to the Kingsport Police Department. He said that stains were visible in the crotch area and that three areas on the panties tested presumptively positive for semen and positive for sperm. Agent Hardy identified a box containing the Defendant's blood sample and a box containing the buccal swabs from C.B. He said he used the blood sample to generate a DNA profile that could be compared with the sample from the girl's panties. He opined that the Defendant was the major contributor of the semen on the panties and that C.B. could not be excluded as the minor contributor of the DNA found on the panties. He explained that "it appears to me that this is her DNA on there . . . ." He said the probability that the sperm on the panties could have come from someone other than the Defendant was greater than the world's population.

On cross-examination, Agent Hardy confirmed that C.B. could not be excluded as the minor contributor of the DNA found on the panties. He said he found skin cells, not blood, on the panties. He said it was not possible to put a date on how long skin cells remained present on an item. He agreed that he could not tell if C.B.'s skin cells had been on the panties before the Defendant's semen was deposited there two months later.

On redirect examination, Agent Hardy testified that C.B. could not be excluded as the contributor of the non-sperm DNA. On recross-examination, when asked if he could prove with scientific certainty that some of the DNA on the panties came from C.B., he said there was a greater than fifty-percent chance the DNA was hers. The Defendant and the State stipulated to the chain of custody and authenticity of the panties, the buccal swabs, and the Defendant's blood sample. The State recalled Det. Adkins, who testified that when she asked the Defendant to whom the girl's panties belonged, he said they belonged to one of his children.

Patricia Bear was called by the defense and testified that the Defendant was her brother-in-law and that she had known him since he was eleven or twelve years old. She said the Defendant was divorced from Eva Flannery in 2002 and was given custody of their children. She said the Defendant asked family members to talk to his daughters about "certain things" because they were girls. She said she babysat the Defendant's daughters and saw them quite often on weekends and sometimes during the week. She said that she had a good relationship with C.B. and that C.B. was an open and talkative child.

Ms. Bear testified that she knew Joanne Hooven because the Defendant had dated Hooven. She said she knew Hooven was married to someone else. She said the allegations of sexual abuse arose "a couple of months" after Hooven and the Defendant ended their relationship. She said she had no knowledge of C.B.'s seeing Hooven during the period

following the breakup until the time the allegations arose. She said that she saw the Defendant with his daughters often and that C.B. acted like a normal child.

Ms. Bear testified that she never saw the Defendant act inappropriately with C.B. She said that she sometimes watched the girls at her mother-in-law's house and that C.B. would be excited to see the Defendant and would ask how long until he got off work. She said it appeared to her that C.B. loved the Defendant. She said she had read the Defendant's second statement, and she could not believe that the Defendant would say what was contained in the statement or that he would sign it. She said she did not know the Defendant had been convicted of domestic assault in 1999. She said she had never seen the Defendant act violently. She said she had a son and did not leave him with anyone because "you don't never know how people are." She said she would still trust her son with the Defendant because her son would tell if anyone ever tried to do anything to him.

On cross-examination, Ms. Bear testified that although she was a Certified Nursing Assistant (CNA), she worked in sterile processing at Indian Path Hospital. She said she worked the day shift, from 4:30 a.m. or 5:30 a.m. until 1:00 p.m. or 2:00 p.m. She said that she did not live with the Defendant and could not observe his actions twenty-four hours a day. She agreed that she was not at her home twenty-four hours a day. When asked the date of C.B.'s birthday, she said she thought it was March 14. She said she was not surprised that C.B.'s birthday was in fact March 28. She said she knew that C.B. had attended Roosevelt Elementary School, but she did not know the name of the school that C.B. attended in Highland. She acknowledged that she said she had a good relationship with C.B. but did not know the name of the school C.B. attended. She said she did not know the date that the Defendant and Hooven ended their relationship. She said she did not know whether C.B. or the Defendant continued to see Hooven after the breakup.

On redirect examination, Ms. Bear testified the she knew of instances when C.B.'s mother had sex in C.B.'s presence. She said she and her husband went to pick up C.B.'s mother to meet the Defendant at his work. She said she discovered C.B.'s mother in bed with two men while C.B. and her sister, B.B., were sitting in the bedroom doorway, playing. She said that another time, she saw a man leave C.B.'s mother's bedroom while zipping his pants while C.B. was in the bedroom. She said she found it odd that C.B. and B.B. were going to spend the night with Hooven on June 9, 2004, because, to her understanding, there had been no contact between Hooven and the children since the Defendant and Hooven ended their relationship. She said she could not remember the exact date the Defendant and Hooven broke up, but she said it had been two or three months before Hooven had the girls spend the night.

On recross-examination, Ms. Bear testified that anyone who abused a child should go to jail but that she did not want to see anything bad happen to her brother-in-law. She agreed that she did not know when or how often Hooven saw C.B. and B.B.

Willie Bear testified that he was the Defendant's brother. He agreed that the Defendant's attorney had reviewed with him the Defendant's second statement to Det. Adkins, in which the Defendant stated he had sexually abused his daughters. He said that he was surprised and that he had never known the Defendant to do things like that with the Defendant's daughters. He said the Defendant was a good father. He said that the Defendant took care of C.B. and B.B., that he bought them clothes and bicycles, that he took them to movies, and that he did "normal father stuff." He said he never saw the Defendant act inappropriately with C.B. He said C.B. had a good relationship with his wife, Patricia Bear. He said he caught C.B.'s mother having sexual relations with men in her bedroom while C.B. was there. He said he caught C.B.'s mother presumably performing oral sex on a man in a parked car while C.B. and B.B. were running around the outside of the car.

Mr. Bear testified that he did not believe the Defendant could have committed the acts described in the Defendant's statement. He said he was abused when he was eleven years old and remembered the event clearly. He said that he could describe everything that happened to him and that he would be surprised if someone could not remember abuse. When asked whether his knowledge of the Defendant's statement about the sexual abuse of both the Defendant's daughters changed his opinion of the Defendant, he said that he had a firm belief that the Defendant did not commit those acts.

The Defendant testified that he had divorced Eva Flannery in 2001. He said he was awarded custody of their daughters. He agreed that as a single father he received help from his family, particularly from his mother and sisters-in-law. He said that Patricia Bear babysat C.B. about four or five times a week and that she had a good relationship with C.B. He admitted to having an affair with Hooven and stated that it began in mid-2002 and lasted about two years. He said their relationship probably ended in April 2004, about two months before the allegations of sexual abuse surfaced. He said that he and Hooven got along "okay" after the breakup and that she wanted to be friends. He said that Hooven only saw C.B. and B.B. the one time after the breakup and that then they were taken from him by the State.

The Defendant testified that the last time his daughters saw Hooven was on Wednesday, June 9, 2004. He said Hooven called and asked if his daughters could spend the night. He said he was comfortable with that arrangement. He said that Hooven called again on Thursday, June 10, 2004, and asked if the girls could spend another night and that he let them. He said he recalled that C.B. testified she did not remember anything from those two nights. He said the next time he saw his daughter was at the trial. He said that a DCS

caseworker, Veronica Camp, called him on Friday, June 11, 2004, and told him she had his children. He said Ms. Camp told him about the allegations of sexual abuse and instructed him to come to her office with clothes for the girls on Monday. He agreed that he drove himself to the June 21, 2004, interview with Det. Adkins and that it lasted about two hours. He said he went to the interview voluntarily. He also agreed that he let Det. Adkins search his residence on June 25, 2005, that he did not request that she produce a search warrant, and that he let her take a quilt and a bedspread from his home.

The Defendant testified that his stepfather drove him to the Justice Center for the July 30, 2004 interview. He said Det. Adkins began talking about the allegations and told him he could leave at any time. He said he started hyperventilating and left. He said the interview had been ongoing for about forty-five minutes before he started hyperventilating. He agreed that the discussion concerned the nature of the allegations. He said he did not remember Det. Adkins asking if he needed an ambulance. He said he did not remember anything after hyperventilating, including whether Det. Adkins was alone and whether he gave a statement. He acknowledged that his signature appeared at the bottom of the statement. He said the statement surprised him. He said he guessed that his stepfather had driven him home from the interview. He said he gave Det. Adkins consent to search his home on August 20, 2004. He agreed that after he gave his second statement, he continued to cooperate with Det. Adkins. He said he had no idea how his semen got on the girl's panties. He agreed that he consented to let Det. Adkins take a blood sample from him and that he felt he had nothing to hide. He said he did not see his second statement until the hearing when the children were removed from his custody. He said he did not do any of the things to C.B. that were written in his statement or about which she testified at the trial. He said he did not know how C.B. came up with her story unless it came from Hooven. He said that shortly before their divorce, he saw C.B.'s mother having sex with the man to whom she was now married. He said it was hard for him to see C.B. again at the trial, and he agreed that he likely would never see her again. He said he loved his daughter.

On cross-examination, the Defendant testified that he lived on Cloudsford Road and that before that he had lived at Model City Apartments with his two biological daughters, C.B. and B.B. He said he let his daughters stay with Hooven a lot while they were dating. He said that Hooven was more active in the girls' lives than their biological mother and that C.B. had formed a strong relationship with her. He said C.B. formed a good relationship with anyone. He agreed that Hooven would be an adult C.B. would trust. He acknowledged that he told C.B. and B.B to keep his affair with Hooven secret from Hooven's husband. He agreed that he told his daughters to lie about his relationship with Hooven and that he told them bad things would happen if Hooven's husband discovered the truth. He said he told his daughters that Hooven might be killed by her husband and scared them into not telling.

The Defendant testified that he broke off his relationship with Hooven because she accused him of being gay. He said that Hooven had believed his ex-wife's "allegations" about his sexual orientation and that they argued because Hooven chose to believe his ex-wife despite his denials. He agreed his theory was that Hooven made his daughters say they were sexually abused in retaliation for the break up. He acknowledged that in his second statement he admitted to homosexual tendencies. He did not agree that there was a possibility Hooven was correct in her suspicions about his sexual orientation. He also agreed that in his first statement to Det. Adkins, he said Hooven took their break up well and remained friends for the girls' benefit. He agreed that he let his daughters stay two nights with Hooven because he trusted her.

The Defendant testified that regarding his first statement, he voluntarily talked to Det. Adkins, and she did not try to make him say anything he did not want to say. He said he was not coerced and was free to leave. He said he initialed changes he wanted made and signed the statement, acknowledging that it was true and correct. He agreed that his signature was on the statement. He said that he agreed to talk to Det. Adkins a second time and that he went to the Justice Center voluntarily. He said that Det. Adkins told him he was free to leave and that he chose to stay and talk. He said he became upset and started to hyperventilate when they began discussing the allegations of sexual abuse. He agreed he had no memory of anything that occurred after he started hyperventilating. He said he had been home an hour when his memory returned. When asked how he knew he had been home about an hour before his memory returned, he said he had guessed. He said that the Justice Center was about a ten to fifteen minute drive from his house. He agreed that he lost his memory only during the time he gave the second statement to Det. Adkins. He acknowledged that he had given a statement and that his signature appeared on it. He acknowledged that the signature on the second statement matched his signature on the first statement. He said he did not remember initialing changes on the second statement. When given a copy of his second statement to review, he said he recognized his initials. He was also given a copy of his first statement, and he acknowledged that the process to correct a statement was to make the change and then initial it. He said it would be fair to say that there was something he wanted changed on the second statement, that he changed it, and that he initialed it.

The Defendant testified that he had blacked out one other time, about three years before his divorce, when his wife and he had an argument. He agreed that he blacked out during a stressful situation involving criminal conduct while he and his ex-wife fought. He agreed that the only other time he had blacked out was when his criminal conduct was being discussed with Det. Adkins. He said he was unaware of any other blackouts since his interview with her. He said he disputed the truth of his statement, but he said that he could not deny it because he could not remember. He said that he could not deny that he told Det. Adkins that he ejaculated perhaps once, that he said, "It was maybe once or twice I put my penis in [C.B.]'s mouth," or that he had an erection because those things were in his

statement and he had signed it. He did not dispute that he gave a statement, but he said he did not remember it.

ANALYSIS

I.

The Defendant contends that the evidence is insufficient as a matter of law to sustain his convictions for rape of a child in Counts 1, 3, and 5, and for incest in Counts 2, 4, and 6. He argues that the elements of rape of a child and of incest require the State to prove sexual penetration of the victim by the Defendant. The Defendant claims that the evidence did not prove beyond a reasonable doubt that he sexually penetrated C.B. and that at the most, the evidence would support convictions for the attempted rape of a child. As a result, he argues, the convictions for incest also must be overturned. The State responds that the evidence is sufficient to show penetration.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). This means that we may not reweigh the evidence, but we must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Any questions about the credibility of the witnesses were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

Tennessee Code Annotated section 39-13-622 states in pertinent part that "[r]ape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." T.C.A. § 39-13-522(a) (2003). Sexual penetration is defined as "intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's . . . body . . . ." Id. § 39-13-501(7) (emphasis added). "The occurrence of penetration, even though penetration is statutorily defined, is a question of fact. Thus, if the evidence is such that any rational trier of fact could have found penetration beyond a reasonable doubt, the evidence must be deemed sufficient." State v. Bowles, 52 S.W.3d 69, 74 (Tenn. 2001).

We conclude that the evidence is legally sufficient to sustain the Defendant's convictions for rape of a child in Counts 1, 3, and 5, and for incest in Counts 2, 4, and 6. C.B. testified that the Defendant inserted his penis into her anus on three occasions, that she screamed because of the pain, and that the Defendant attempted to muffle her cries with a

cloth or a sock. In the Defendant's second statement to Det. Adkins, he admitted to attempting to force his penis into C.B.'s anal opening. Dr. Scruggs testified that although C.B. had reported that the Defendant had been unsuccessful in his attempts to penetrate her, C.B. also had reported that the Defendant tried to penetrate her anal opening with such force that it hurt. We presume the jury accredited C.B.'s testimony over the Defendant's testimony and resolved any conflicts in the testimony in favor of the State. Only the slightest amount of sexual penetration was required to satisfy the statute. Based on the evidence presented, a rational trier of fact could have found beyond a reasonable doubt that the Defendant sexually penetrated C.B.'s anal opening. Having concluded that the evidence was sufficient to support the Defendant's convictions for rape of a child, it follows that the evidence was sufficient to support the Defendant's convictions for incest.

II. and III.

We address the Defendant's next two issues together. The Defendant contends (1) that the trial court erred when it refused to allow him to offer evidence of the victim's prior sexual behavior after the State offered evidence that the victim had never been touched inappropriately by anyone other than the Defendant and (2) that the trial court erred when it held that B.B. was an available witness for the defense for purposes of Tennessee Rule of Evidence 804(a)(5). The State counters that the evidence was irrelevant hearsay. The State also argues that the Defendant had failed to establish that B.B. was unavailable as a witness and that the statement was made against her interests as required by Rule 804(b)(3).

Det. Adkins's notes contained the following summary of her interviews with C.B. and B.B.:

> I asked [C.B.] if [B.B.] ever put lotion on her private part and made it burn and [C.B.] said it did not. [B.B.] came to the Justice Center with [C.B.], [and] their foster mother, so I talked with her again very briefly. She said that she did put lotion on [C.B.] and burned her.

During a hearing pursuant to Tennessee Rule of Evidence 412(d)(2), the defense counsel argued that this statement was admissible under Rules 412(c)(2) and 804(a)(5) to impeach C.B.'s testimony that no one other than the Defendant had touched her inappropriately. Counsel also argued that the statement was admissible hearsay because B.B. was unavailable pursuant to Tennessee Rule of Evidence 804(a)(5). He stated that B.B. had been adopted and that there was no way for him to acquire knowledge of her whereabouts in order to subpoena her to testify at the trial. During a jury-out hearing, counsel stated that he had not attempted to subpoena B.B.:

[DEFENSE COUNSEL]: 804(a)5. I can't prepare her by process because I don't have an address and I can't get one since she's been adopted.

THE COURT: So, General, would you agree that that would probably fit under that category.

[THE STATE]: Under which category, Judge?

THE COURT: Rule 804-5, is absent from the hearing and the [proponent] of the statement has been unable to procure the declarant['s] attendance by process.

[THE STATE]: Well, he's not tried, Judge. Until today he didn't even know she'd been adopted.

[DEFENSE COUNSEL]: No, I knew she was adopted. I knew she was in State custody. I do a lot of juvenile work, I know once they're placed, if a defense attorney calls and asks, I'm not going to get any addresses, so I knew there's no way I'd be able to get to her.

. . . .

THE COURT: Well, let me tell you where I am on this . . . ; number one, I'm not sure that there has been a showing that [B.B. is] unavailable. Okay, I mean there's ---- I know what you're saying and you're telling me but there's not been any evidence to that or that you have made any effort to subpoena her; but that's not really the issue.

. . . .

> I don't think that that's the issue but I'm going to go ahead and rule on the merits itself.

The trial court ruled that even if the declarant were unavailable, her statements would nonetheless be excluded under Rule 412(d)(4) on the grounds that "any probative value that it ha[d was] far outweighed by its prejudicial effect." The court also stated it did not "find that the fact that [C.B.'s] sister may have applied lotion necessarily means that it was inappropriate."

Generally, Rule 412 prohibits evidence of specific instances of a sexual assault victim's sexual behavior. Tenn. R. Evid. 412(c). Sexual behavior is "sexual activity of the alleged victim other than the sexual act at issue in the case." Tenn. R. Evid. 412(a). "This broad definition 'deals with sexual intercourse as well as every other variety of sexual expression.'" State v. Sheline, 955 S.W.2d 42, 47 n.6 (Tenn. 1997) (quoting Neil P. Cohen, et al., Tennessee Law of Evidence § 412.2, at 241 (3d ed. 1995) (considering the victim's kissing another person on the evening of the offense under Rule 412). The Advisory Commission Comments to Rule 412 state that subdivision (c)(2) allows specific instances of the victim's sexual behavior to rebut evidence presented by the prosecution about the victim's sexual behavior. "This exception is narrow, however. It only permits the defendant to prove specific acts when needed to rebut the specific evidence presented by the prosecution's proof." Tenn. R. Evid. 412, Adv. Comm'n Cmts. Under Rule 412(d), the court must conduct a hearing to determine whether the evidence is admissible. Tenn. R. Evid. 412(d)(2). "If the court determines that the evidence which the accused seeks to offer satisfies subdivisions (b) or (c) and that the probative value of the evidence outweighs its unfair prejudice to the victim, the evidence shall be admissible in the proceeding . . . ." Id. 412(d)(4).

Rule 412 is a rule of relevance. State v. Brown, 29 S.W.3d 427, 430 (Tenn. 2000). The standard of appellate review is abuse of discretion when the decision of the trial judge concerns admissibility of evidence based on relevance. See State v. Dubose, 953 S.W.2d 649, 652 (Tenn. 1997). The trial court's decision to admit or exclude evidence will be overturned on appeal only where there is an abuse of that discretion. Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 442 (Tenn. 1992). An abuse of discretion occurs when the trial court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997). Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Under Rule 402, relevant evidence is generally admissible. However, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See Tenn. R. Evid. 403, 412.

We hold that the Defendant has failed to show that the trial court abused its discretion when it excluded B.B.'s testimony under Tennessee Rules of Evidence 412 and 804. The Defendant has not shown that the trial court applied an incorrect legal standard or that it reached a decision which was against logic or reasoning when it excluded the statement made by B.B. to Det. Adkins under the provisions of Rule 412(d). Nor does the Defendant offer authority for his proposition that an adopted child is unavailable for the purposes of the hearsay exceptions embodied in Rule 804. In addition, Rule 804 requires not only the declarant's unavailability but that the statement be given (1) as former testimony, (2) under a belief of impending death, (3) against pecuniary, proprietary, or penal interest, or (4) as personal or family history. Tenn. R. Evid. 804(b)(1)-(4). The Defendant has failed to show that B.B.'s statement that she applied lotion to her younger sister's vaginal area was "so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Tenn. R. Evid. 804(b)(3). The Defendant is not entitled to relief on these issues.

IV.

The Defendant next contends that the trial court erred in allowing the State to attack the testimony of the Defendant's witnesses during the State's closing argument. The Defendant argues that the State's closing argument went beyond the scope allowed by Rule 29.1(c) of the Tennessee Rules of Criminal Procedure and that the trial court erred when it overruled defense counsel's objection to the argument. The State contends that the trial court properly allowed it to address subject matter the Defendant raised in his closing argument.

Trial courts have substantial discretionary authority in determining the propriety of closing arguments. The trial court has the discretion to control the argument, and its action will be affirmed absent an abuse of that discretion which affected the verdict. State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978). Tennessee Rule of Criminal Procedure 29.1(c) governs the procedure and scope of the State's closing argument:

> (1) State's Final Closing Argument. – The state shall be allowed a final closing argument following the defendant's closing arguments, unless the defendant has waived closing argument or the state has waived all argument or its final argument.

> (2) Scope of State's Final Closing Argument. – The state's final closing argument is limited to the subject matter covered in the state's first closing argument and the defendant's intervening argument.

Tenn. R. Crim. P. 29.1(c).

In this case, after the defense objected to the prosecuting attorney's argument, the trial court found that the defense had raised the issue of the defense witnesses' testimony during closing argument and allowed the State to address the defense witnesses' testimony in its final closing argument. The prosecuting attorney stated:

> I want to talk to you about the testimony of Patricia Bear. Mr. Fabus brought up the defendant's statement and that she'd seen the statement and all these things and then he asked the question, "Would you trust your son with the defendant," and what was her response. "I don't leave my son with anybody." What does that tell you about her leaving her son with the defendant?
>
> . . . .
>
> Look at his other witness, Willie Bear, Patricia's husband. He made the statement "I've never known him to do anything like that with his daughters." The question was . . . . I pose this question to you, do people do things like this to their daughters in front of other people?

The record reflects that the subject matter of the State's opening argument and the Defendant's argument included the testimony of Willie Bear and Patricia Bear. We conclude that the trial court did not abuse its discretion when it allowed the State to comment on the defense witnesses' testimony during the State's closing argument.

IV.

Finally, the Defendant contends that the trial court erred when it sentenced him to seventy-five years as a Range I offender. He argues that the trial court misapplied multiple enhancement factors and that it erred when it imposed consecutive sentences. The State contends that the trial court considered the appropriate sentencing principles and all relevant facts and circumstances and properly sentenced the Defendant.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d) (2006).[1] As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence.

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994); see T.C.A. § 40-35-210(e) (2006).

Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee, (7) any statement that the defendant made on his own behalf, and (8) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236 (Tenn. 1986).

In imposing a specific sentence within the appropriate range of punishment for the defendant:

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[1] Although no ex post facto waiver is contained in the record, the transcript of the sentencing hearing reflects that the Defendant signed a written waiver which allowed him to be sentenced under 2005 Amendments to the 1989 Sentencing Act and that the trial court received the waiver without objection by defense counsel. See 2005 Tenn. Pub. Acts ch. 353, § 18 (effective June 7, 2005).

> [T]he court shall consider, but is not bound by, the following advisory sentencing guidelines:
>
> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
>
> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

T.C.A. § 40-35-210. Because the court misapplied enhancement factors and may have considered inadmissible hearsay evidence, we review the sentencing determinations de novo, with no presumption of correctness. See Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

1. Enhancement Factors

At the sentencing hearing, Det. Adkins testified that the Defendant acknowledged to her that he had sexual contact with both of his children. She read a portion of the Defendant's July 30, 2004 statement in which the Defendant stated that he had orally penetrated and had attempted anal penetration of his daughters. She said that when the investigation began, C.B. was between six and seven years old and B.B. was between eleven and twelve years. She said that C.B. gave details of the abuse and that C.B.'s recollection of the events remained consistent. She said that B.B. was not as verbally expressive as C.B. because B.B. was mentally retarded and that B.B. cried a lot during the interview. She said that she asked B.B. yes-or-no questions and that B.B. responded affirmatively when asked whether the Defendant had sexually penetrated her "private part." She said that C.B. told her the abuse had been ongoing for three years.

Defense counsel objected to the testimony about B.B.'s statements because the Defendant was to be sentenced only for his convictions for rape and incest of C.B. and because the charges against the Defendant related to B.B. were pending. The trial court overruled the objection and allowed Det. Adkins to testify to B.B.'s statements because the testimony might have been relevant to an enhancement factor.

Det. Adkins testified that she had investigated the Defendant's alleged sexual abuse of a third child, who had been twelve years old at the time. She said the victim, L., told her

that the Defendant took him to an area called Five Caves and that the Defendant made repeated remarks about male erections. She said L. reported that the Defendant tried to make L. urinate in front of him. She said L. said that when he protested, the Defendant tried to belittle him. She said L. told her that the Defendant tried to make him watch pornographic movies and that when he asked to call his father, the Defendant told him the telephone was disconnected. She said L. reported that while the Defendant tickled him, the Defendant placed his hand on L.'s penis. She said L. told her that after the touching occurred, the Defendant stated, "Now I'm going to have to go to the bathroom and jack off." She said L. stated that while the Defendant was in the bathroom, he tried the telephone, discovered it was working, and called his father.

Defense counsel again objected to the hearsay testimony. The trial court overruled the objection and stated that it could allow reliable hearsay.

Sue Frazier Bear testified that she was a child therapist and licensed professional counselor at the Children's Advocacy Center. She said her practice was limited to treating sexually and physically abused children. She said that she met with C.B. approximately every other week from the summer of 2004 to the summer of 2006. She said that the protocol for sexually abused children was ten to twelve sessions but that she continued therapy with C.B. because C.B. was traumatized by the sexual abuse and required additional sessions. She said that what C.B. told her substantiated the DCS referral. She said C.B. was "deeply humiliated, deeply embarrassed, deeply ashamed." She said the sexual abuse of C.B. had occurred over a period of years. She said C.B. had described three instances of rape and had reported that her father made her and her sister watch pornographic movies. She said that children who are sexually abused have more instances of runaway behavior, self-destructive behavior, alcohol and sex abuse, depression, anxiety and mental health issues, and problems with their own sexuality and relating to other people. She said that C.B. suffered from anxiety and depression and that C.B. blamed herself for her and her sister's abuse. She also said that C.B. and B.B. had exhibited inappropriate sexual behavior by touching one another and that this behavior was indicative of childhood sexual abuse. She said that C.B. was terrified of coming to court and testifying against her father. She said that C.B. had trust issues but that C.B. had learned to trust her and the foster parents.

Ms. Frazier Bear testified that C.B. took a protective role over her older sister, B.B., who was mentally retarded and developmentally delayed. She said, for example, during a therapy session, B.B. made a clay ball, put a hole in the ball, and penetrated the hole with a crayon. She said that B.B. elbowed C.B. and laughed but that C.B. did not laugh and redirected B.B.'s attention. She said she believed that C.B. told about the abuse more for B.B.'s sake than for her own.

On cross-examination, Ms. Frazier Bear testified that she stopped regular therapy with C.B. in 2006 and that she had seen C.B. only about four times since, whenever C.B. was scheduled to return to court. When asked by the trial court whether C.B. continued to exhibit mental effects of the abuse, Ms. Frazier Bear responded that C.B. still exhibited anxiety, depression, and sadness.

The trial court found that enhancement factor (1) applied, that "the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range." T.C.A. § 40-35-114. The court found that the Defendant had a prior criminal conviction for domestic violence and that the Defendant had admitted in his own statement, which was contained in the presentence report, that he engaged in criminal sexual behavior with his other daughter, B.B. The court also applied factor (4), that "a victim of the offense was particularly vulnerable because of age or physical or mental disability." Id. at (4). The court found that C.B. was particularly unable to resist the crime or to summon help because of her very young age and that the vulnerability of the victim made her more of a target for the abuse.

The trial court found that factor (6) applied–the personal injuries inflicted upon the victim were particularly great–because of the Defendant's physical size compared to the size of the victim at the time of the offense, because of the victim's young age, and because of the Defendant's admission that he had sexually penetrated the victim. See id. at (6). Based on the Defendant's admission that he was aroused and his statement that he had ejaculated at least once in the victim's mouth, the court found that factor (7), the offense involved a victim and was committed to gratify the defendant's desire, should also apply. See id. at (7). The court also applied factor (14), the defendant abused a position of private trust in a manner that significantly facilitated the commission or the fulfillment of the offense, because it found that it could not "think of any greater trust that a child has [than] with their father" and that this trust significantly facilitated the commission of the offense because "at her age she didn't know any better." See id. at (14). Finally, the court applied factor (16), that the defendant was adjudicated to have committed a delinquent act that would constitute a felony if committed by an adult, because the presentence report indicated the Defendant "was convicted of [second degree burglary] on a memorandum of understanding." See id. at (16). The court acknowledged that the second degree burglary charge was "very, very old but that is a factor that I note . . . as well." The court found no mitigating factors. The Defendant challenges the application of factors (4), (6), and (16).

Factor (4)

The Defendant challenges the application of factor (4), that the victim of the offense was particularly vulnerable because of age or physical or mental disability, because the State

did not offer evidence of any particular vulnerability regarding C.B. other than her age. Our supreme court has held that factor (4) may be applied to a conviction for rape of a child. State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). The supreme court stated, "the vulnerability enhancement relates more to the natural physical and mental limitations of the victim than merely to the victim's age." Id. A victim may be particularly vulnerable if he or she is "incapable of resisting, summoning help, or testifying against the perpetrator." Id. The State bears the burden of proving the victim's vulnerability, but the evidence need not be extensive. Id.; State v. Poole, 945 S.W.2d 93, 97 (Tenn. 1997). The application of factor (4) is appropriate if the facts of the case show that the victim's vulnerability had some connection to or some influence on her inability to resist, to summon help, or to testify against the Defendant. State v. Lewis, 44 S.W.3d 501, 505 (Tenn. 2001) (citing Poole, 945 S.W.2d at 96). A court may also give additional weight to the age of the victim when the victim is very young or very old. Id.; Poole, 945 S.W.2d at 97. However, a court may not base the application of factor (4) solely on a victim's age. Poole, 945 S.W.2d at 98.

In Adams, the supreme court determined that enhancement factor (4) was inapplicable to a defendant's sentences for aggravated sexual battery and aggravated rape of three boys, ages four, five, and twelve. 865 S.W.2d at 35-36. The court concluded that the boys' ages alone did not establish their particular vulnerability and that the State had not met its burden in proving how the boys were "incapable of resisting, summoning help, or testifying against the perpetrator." Id. at 35. Similarly, in Poole, the supreme court refused to hold that a seventy-year-old victim was particularly vulnerable based merely on the victim's age and the trial court's statement, without factual findings, that the victim was particularly vulnerable. 945 S.W.2d at 97-98.

In this case, the court determined that factor (4) applied because C.B. was between six and eight years old at the time of the offenses, much younger than the thirteen-year-old threshold established by the child rape statute, and because she was "particularly unable to resist the crime or to summon help." The court stated:

> I find in this particular case that this particular victim was particularly unable to resist the crime or to summon help and because of her age I feel like that it should be entitled to additional weight and I find also that the vulnerability of the victim made her more of a target in this particular case. And so therefore at the time that these crimes occurred this particular victim was some ---- she would have been between 6 and 8 years of age during the commissions of these crimes so I find all those apply in this particular age. She was ---- I mean to be rape of a child it has to be under the age of 13 and because she's so much younger than that I do find that she's particularly

> vulnerable in this particular case so I do find that as an enhancing factor.

The trial court did not make factual findings to support its conclusions, and its application of factor (4) based merely on the victim's age was error. See Adams, 865 S.W.2d at 35-36; Poole, 945 S.W.2d at 97-98. In our de novo review of the Defendant's sentences, we conclude that the record does not support the application of factor (4). The victim's age alone does not establish her particular vulnerability, and no evidence of a particular mental or physical vulnerability appears in the record.

Factor (6)

The Defendant also contends that enhancement factor (6), that the personal injuries inflicted upon the victim were particularly great, should not have been applied because there was no evidence that the victim's injuries were "particularly great" when compared to injuries that normally result from child rape and incest. The court applied factor (6) because the offense involved the rape of a young child by her father, because of the disparities in the Defendant's size and the victim's size, and because the victim testified that she was physically hurt by each rape.

The application of factor (6) does not require that the injuries be physical, nor does it require expert proof of psychological injury. State v. Arnett, 49 S.W.3d 250, 260 (Tenn. 2001); State v. Smith, 891 S.W.2d 922, 930 (Tenn. Crim. App. 1994). The application of factor (6) "is appropriate where there is specific and objective evidence demonstrating how the victim's mental injury is more serious or more severe than that which normally results from this offense. Such proof may be presented by the victim's own testimony, as well as the testimony of witnesses acquainted with the victim." Arnett, 49 S.W.3d at 260.

In this case, the court did not find that C.B.'s physical or mental injuries were more serious or more severe than those which normally resulted from the rape of a child by her father. However, the court noted the evidence of C.B.'s continued anxiety, depression, sadness, stomach aches, and headaches when it imposed consecutive sentencing. In addition, Ms. Frazier Bear testified that C.B. required additional counseling, well beyond the usual ten to twelve sessions offered to a child victim of sexual abuse. This court has affirmed the application of enhancement factor (6) when the victim of child rape and a family member testified that the victim required weekly counseling and continued to experience emotional and psychological problems as a result of the rape. See State v. Chester Floyd Cole, No. W2001-02871-CCA-R3-CD, Madison County, slip op. at 6 (Tenn. Crim. App. Dec. 31, 2002), app. denied (Tenn. May 19, 2003). We hold that the record supports the application of factor (6) to the Defendant's convictions, albeit without substantial weight.

Factor (16)

Finally, the Defendant argues that enhancement factor (16), which provides "[t]he defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult," should not be applied because his juvenile pretrial diversion was not an adjudication of guilt. T.C.A. § 40-35-114(16). The presentence report listed the Defendant's charge for second degree burglary in 1985. The Defendant argues that this offense was resolved through pretrial diversion and that it is not an adjudication of guilt as required by Code section 40-35-114(16). The State counters that the disposition of pretrial diversion is not clear from the record and that the Defendant did not challenge this factor at his sentencing hearing.

The presentence report shows that the disposition of the Defendant's second degree burglary offense was a "memorandum of understanding." The procedures for implementing juvenile pretrial diversion are left to the local courts, and a memorandum of understanding is a method by which criminal prosecution may be suspended and the district attorney general may enforce pretrial diversion. See Tenn. R. Juv. P. 23., Adv. Comm'n Cmts; T.C.A. § 40-15-105. If the defendant successfully completes juvenile pretrial diversion, the juvenile court must dismiss the petition. Tenn. R. Juv. P. 23(d). Pretrial diversion is not an adjudication of delinquency but a suspension of adjudication. Id. at (a). A juvenile must comply with the terms of the diversion, or the suspended petition will be reinstated and adjudication will resume. Id. at (c). The purpose of including juvenile adjudications in a presentence report is to enhance or mitigate a subsequent sentence. State v. Stockton, 733 S.W.2d 111, 113 (Tenn. Crim. App. 1986). A juvenile adjudication of a delinquency which would constitute a felony if committed as an adult may be considered as an enhancement only under factor (16) and not under factor (1), a history of criminal convictions or criminal behavior. See T.C.A. § 40-35-114(1), (16); State v. Adams, 45 S.W.3d 46, 58 (Tenn. Crim. App. 2000).

The record is absent information showing the Defendant failed to complete the pretrial diversion. At the sentencing hearing, the trial judge stated that the Defendant "was convicted of [second degree burglary] on a memorandum of understanding . . . that's very, very old . . . ." However, the presentence report indicates only that adjudication of the second degree burglary offense was suspended by the memorandum of understanding. The Defendant's criminal conduct as a juvenile could not be considered under any enhancement factor other than (16). Because the Defendant was not adjudicated delinquent for second degree burglary, the trial court incorrectly applied factor (16).

Rape of a child is a Class A felony. T.C.A. § 39-13-522(b). The sentencing range for a Range I, standard offender convicted of a Class A felony is fifteen to twenty-five years. T.C.A. § 40-35-112(a)(1). Incest is a Class C felony. T.C.A. § 39-15-302(b). The

sentencing range for a Range I, standard offender convicted of a Class C felony is three to six years. T.C.A. § 40-35-112(a)(3). We conclude that sentences of twenty-three years for each conviction for rape of a child conviction and five years for each conviction for incest are justified based upon the application of the following enhancement factors: (1) a history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, (6) the personal injuries inflicted upon the victim were particularly great, (7) the offense was committed to gratify the Defendant's desire for pleasure or excitement, and (14) the Defendant abused a position of private trust. See T.C.A. § 40-35-210(c).

2. Consecutive Sentencing

The evidence at the sentencing hearing was that there was a second victim and possibly a third victim of abuse by the Defendant. Det. Adkins testified that during her investigation, C.B.'s sister, B.B., and another child, L., reported that the Defendant had sexually abused them. Ms. Frazier Bear testified that she had counseled both C.B. and B.B. Ms. Frazier Bear also testified that C.B. required therapy beyond the normal ten to twelve sessions and that C.B. continued to suffer anxiety, depression, stomach aches, and headaches.

The trial court sentenced the Defendant to twenty-five years for each conviction for rape of a child and to six years for each conviction for incest. The trial court ordered each of the Defendant's sentences for rape of a child to be served concurrently with each of the Defendant's sentences for incest. The court then ordered that he serve three of the sentences for rape of a child consecutively, for an effective sentence of seventy-five years.

The trial court stated its reasons for the imposition of consecutive sentencing. It found that there were at least two or more statutory offenses involving sexual abuse of a minor and that there were aggravating circumstances in this case because of the Defendant's relationship as the victim's father. The court also found that the time span of the undetected abuse was a period of almost two years and that the nature and scope of the sexual acts was oral and anal penetration of the victim. The court found extensive residual, mental, and physical damage to the victim, based on the testimony of the victim's counselor from the Children's Advocacy Center, on the lengthy period of mental health treatment that the victim received, and on the continuing physical manifestations of the victim's anxiety. After it had imposed consecutive sentencing, the court found that an extended sentence was also necessary to protect the public from further criminal conduct by the Defendant. The court based this finding on testimony received at the sentencing hearing, over defense counsel's objections, concerning a second victim and possibly a third victim of sexual abuse at the hands of the Defendant.

The Defendant concedes that he was convicted of two or more statutory offenses involving sexual abuse of a minor and that the time span of undetected activity weighs against him. However, the Defendant contends that the trial court erroneously considered statements regarding alleged abuse of two other minors. He also argues that there was no evidence submitted concerning the residual damage to the victim. The State argues that the trial court acted within its discretion when it ordered consecutive sentencing.

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the court may order sentences to run consecutively if it finds by a preponderance of the evidence that the defendant stands

> convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims.

T.C.A. § 40-35-115(b)(5). Rule 32(c)(1) of the Tennessee Rules of Criminal Procedure requires that the trial court "specifically recite the reasons" behind its imposition of a consecutive sentence. See, e.g., State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing).

The record shows that the court applied the factors for consecutive sentencing required by Tennessee Code Annotated section 40-35-115(b)(5) and stated its reasons for the imposition of consecutive sentencing pursuant to Rule 32(c)(1) of the Rules of Criminal Procedure. Tennessee Code Annotated section 40-35-210(f) requires the trial court to base its sentence on the evidence in the record of the trial, the sentencing hearing, the presentence report, and the record of prior felony convictions. T.C.A. § 40-35-210(f) (2006). Furthermore, the rules of evidence apply to sentencing hearings. T.C.A. § 40-35-209(b); State v. Taylor, 744 S.W.2d 919, 921 (Tenn. Crim. App. 1987). An exception is made for the introduction of reliable hearsay. T.C.A. § 40-35-209(b). However, before reliable hearsay may be admitted as evidence, two conditions must be met. First, the opposing party must be afforded a fair opportunity to rebut any hearsay admitted in evidence. Id. Second, indicia of reliability must be present to satisfy the due process requirement. Id.

Det. Adkins's testimony about B.B.'s and L.'s statements was hearsay. See Tenn. R. Evid. 801. Defense counsel objected to their admission and was afforded an opportunity to rebut the testimony through cross-examination of Det. Adkins, which he declined to do. However, the Defendant was not allowed the opportunity to cross-examine B.B. or L., and,

other than the court's statement that the testimony was reliable hearsay, nothing in the record provides the indicia of reliability required by the statute. See T.C.A. § 40-35-209(b).

The Defendant's own statements about his sexual abuse of his daughter, B.B., were properly considered at the sentencing hearing. See State v. Baker, 956 S.W.2d 8, 17 (Tenn. Crim. App. 1997) (statements contained within the presentence report are reliable hearsay). The trial court's reliance, if any, on the hearsay statements made by B.B. and L. was error, because the Defendant was not given an opportunity to confront B.B. or L. and because the reliability of the statements had not been otherwise established. However, the court had already imposed the consecutive sentencing based on the factors in Code section 40-35-115(b)(6) before it made the comment about other victims. Therefore, if the court did consider the inadmissible hearsay when it sentenced the Defendant to consecutive sentences, we cannot say that the error more probably than not affected the Defendant's sentences. See T.R.A.P. 36(b). The Defendant is not entitled to relief on this issue.

CONCLUSION

In consideration of the foregoing and the record as a whole, the convictions are affirmed, and the sentences are modified to twenty-three years for each rape of a child and to five years for each incest, for an effective sentence of sixty-nine years.

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JOSEPH M. TIPTON, PRESIDING JUDGE